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IN THE

Supreme Court of the United States

October Term, 1959

No. 807

JEAN CAPECE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALBERT J. KRIEGER
THEODORE KRIEGER
149 Broadway
New York 6, N. Y.
Attorneys for Petitioner

32 CASE PRESS INC., 82 Beekman St., N. Y.—BEekman 3-2005

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Jean Capece, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against her in the above entitled case on January 12, 1960.

A. The Opinion Below

The opinion of the Court of Appeals in this case has not as yet been officially reported. It is set forth in Appendix A annexed to this petition.

B. Jurisdiction

The judgment of the Court of Appeals was entered on January 12, 1960. On February 18, 1960, Mr. Justice John M. Harlan granted an order extending the time of the petitioner to file her petition for a writ of certiorari to and including March 26, 1960. The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Questions Presented

1. Was the petitioner denied due process and benefit of the right of counsel when the Government denied access to a witness before trial?

2. Was the petitioner denied due process and benefit of the right of counsel when the Government secreted a witness before trial?

3. Was there a denial of due process when, despite the admonitions of this Court in *Krulewitch* v. *United States*, 336 U. S. 440 (1949), and in *Kotteakos* v. *United States*, 328 U. S. 750 (1946), as to the broadening of conspiratorial prosecutions, the instant prosecution was so broadened as to include the petitioner, the "girl friend" of Joseph DiPalermo?

4. Was there a denial of due process by the admission of the inflammatory and highly prejudicial testimony of the

customs agents as to funds found in the petitioner's brassiere?

D. Constitutional Provisions and Statutes

The Constitutional provisions and statutes involved are:

1. United States Constitution, Amendment VI.

2. United States Code, Title 21, Sections 173 and 174.

All of the foregoing are set forth in full in Appendix B annexed to this petition.

E. Summary Statement of Matters Involved

A one-count indictment was returned against the petitioner and 36 other defendants alleging the crime of conspiracy to violate Title 21, Sections 173 and 174, of the United States Code.

The petitioner, together with 16 co-defendants, were tried. A motion of acquittal was granted as to one defendant at the conclusion of the entire case and another defendant was acquitted by the jury. The petitioner was found guilty as charged and was sentenced to 5 years imprisonment and has been continued on bail.

On Appeal to the United States Court of Appeals for the Second Circuit, the conviction of the petitioner as well as all other defendants were affirmed, save as to the defendant, Rodriguez. As to him the conviction was reversed and the indictment ordered dismissed. The trial of the case took more than three months and the typewritten transcript totalled more than 8,000 pages.

F. Reasons for Granting the Writ

I. The petitioner was denied due process and the benefit of the right of counsel by the denial of access to a witness coupled with the secreting of the said witness by the Government.

Prior to the trial an application was made by an attorney for one of the defendants to the trial judge for permission to interview Nelson Silva Cantellops so as to prepare for trial. Pursuant to the "ground rules" a motion made on behalf of one defendant was deemed a motion made on behalf of all defendants unless there was a specific disassociation thereto. There was no disassociation and the fact that the attorney who made said application represented a defendant as to whom the Court of Appeals ordered a reversal of the conviction and dismissal of the indictment, is of no import. Cooperation amongst counsel for the defense was not unknown in preparation for the trial.

The Sixth Amendment of the Constitution of the United States affords to an accused in a criminal prosecution, the right of compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense. Admittedly, this statement might appear to be such a basic and fundamental part of our American jurisprudence that its mere repetition is a laboring of the obvious. However, from time to time it has become necessary for Appellate Courts to enunciate and at times repeat these fundamental truths, and their corollaries.

Counsel for an accused would without question be derelict in his duty as an advocate for the defense if he were to appear in Court, answer "Ready for Trial" and proceed to trial without a thorough and complete investigation of

his client's case. Such investigation and preparation for trial must of necessity include more than a mere reading of an indictment or a conversation with one's client or perhaps a conversation with a prosecuting attorney.

In the instant case in an effort to properly prepare for trial a defense attorney made an application before the learned trial court for the court's aid and assistance in the preparation of the defense (1a-17a).* On December 9, 1958, approximately one month before the instant case proceeded to trial, counsel stated that he had discovered that a certain Nelson Cantellops was within the custody of the United States Government; that he was at that time under the custody of the United States Marshal for the Southern District of New York; and that the Marshal would not allow counsel to ask the said Nelson Cantellops if he would consent to being interviewed by said counsel in regard to certain facts and circumstances in the preparation of the defense. Counsel pressed as vigorously as he could that, in his opinion, he had the right to ask said Nelson Cantellops personally as to his willingness to be interviewed. He stated (4a):

> "Mr. A. Krieger: I do feel that under those circumstances the only way in which a fair question can be put to him, where he can rightfully say yes or no, without any intangible influence over him, is if, I, in the company of the security guard, because he is a prisoner, were to say to him, 'Mr. Cantellops, I am the attorney for Benjamin Rodriguez. I believe that you may have some information which would be useful to me, and perhaps then you might even be called as a witness in behalf of Mr. Rod-

* Numbers in parentheses refer to pages of Petitioner's Appendix to her Brief below.

riquez if such a situation were to come about. I would like to interview you in regard to this case.'

"Now at that point he has a right to say to me yes or no. I do not contend that I can go any further than that, but I respectfully submit to your Honor that I have the right to confront him with that question in person."

The mere fact that a witness or a possible witness is in custody should not alter the right of an accused to confer or consult with the particular individual in the same manner as if he were a free individual on the street. The learned trial Court itself posed this example (8a):

"On the other hand, the Government can't do this: Jones is on trial. Smith is a likely witness for both sides. They make Smith unavailable so that it is not possible for the defendant to properly prepare for trial, and that would be violative of due process and of fairness."

It is the petitioner's contention that the Government did just that. The learned Court refused to order the Marshal to allow the attorney to ask Nelson Cantellops for an interview. Beyond that the Court indicated to counsel (15a):

"So that there may be no misunderstanding as to the Court's ruling, there is no limitation, of course, or inhibition against your presenting yourself at the place where this person is incarcerated and request in an appropriate manner, whatever the regular customary manner is, that Mr. Krieger would like to see you; would you see him?"

Counsel pointed out that there was one difficulty in such an arrangement, that he did not know the specific where-

abouts of the said Nelson Cantellops. The following exchange then took place (16a):

> "The Court: That is a different problem.
> "Mr. A. Krieger: I don't know where he is.
> The Court: You would present yourself otherwise but you don't know where he is?
> Mr. A. Krieger: Surely."

The Court then questioned the United States Attorney (16a).

> "The Court: Is there any objection to making that disclosure?
> Mr. Lundin: Yes, there is Your Honor. We would not want to disclose the whereabouts of anyone brought here on a writ. Counsel presented himself down at the Marshal's office the other day and he said he knew the man was down there. That is what Marshal Lunney told us."

The learned Trial Court refused the application and there, the petitioner most respectfully submits, is error compounded with error.

No parallel situation has arisen in a federal jurisdiction, however it did arise before the Court of Criminal Appeals of Texas in *Leahy* v. *State*, 111 Tex. Cr. R. 570 (1927) wherein it was held at pages 585-7:

> "The serious question in this case is presented by the bill of exception showing that all opportunity to interview the witness Martinez had been denied appellant and his counsel. Motion was made for such opportunity of interview before announcement of ready for trial. It was shown that the witness was in jail in the town where the trial was being had,

and the sheriff declined to permit the appellant or his attorneys to talk to said witness unless required to do so by the court * * *.

The question is presented by this bill as to whether the state can legally deny opportunity of interview to the accused or his counsel with a state's witness, or, put in another way, whether the state can, by the affirmative acts of its officers, prevent all contact between a prospective witness for the state and accused or his counsel. *This does not involve the question of the right of an accused to obtain an order from the court to compel a witness to talk or submit to an interview who objects to same.* That the court has no authority to enter such an order is well settled. * * *. These various provisions evidence clearly an intention to have a prosecution conducted fairly and in the open, with every opportunity given the accused to prepare for his trial. The law does not give to the state a proprietary interest in a witness which entitles it to his exclusive possession * * *. If an accused is to be denied all opportunity to talk to a witness then the above compulsory process clause of the Constitution becomes in most part an empty and high sounding phrase. If the state can incarcerate a witness and prevent any chance of interview and opportunity to know in advance what such a one's testimony will be, it is in effect a nullification of the salutary provisions of the clause of the Constitution already referred to, as practically all of its benefits are thus destroyed. Such opportunity of interview would seem to be a necessary implication arising from the compulsory process clause above quoted. The right of reputable counsel to interview a witness has apparently been so rarely denied in American jurisprudence that we find very few cases on the subject." (Italics supplied.)

The Texas court was here following the reasoning of *State* v. *Papa*, 32 R. I. 453 (1911), wherein it was most vigorously said at page 459:

> "The attorney for the defendant, not only had the right, but it was his plain duty towards his client, to fully investigate the case and to interview and examine as many as possible of the eye-witnesses to the assault in question, together with any other persons who might be able to assist him in ascertaining the truth concerning the event in controversy. Witnesses are not parties, and should not be partisans; they do not belong to either side of the controversy; they may be summoned by one or the other or both, but are not retained by either. It would be a most unfortunate condition of affairs if a party to a suit, civil or criminal, should be permitted to monopolize the sources of evidence applicable to the case to use or not as might be deemed most advantageous. Such a proceeding in a criminal case would violate the provisions of the Constitution of this State Article 1, section 10, which provides that, 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining them in his favor, to have the assistance of counsel in his defense, and shall be at liberty to speak for himself; nor shall he be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land.' The defendant, therefore, has the constitutional right to have compulsory process for obtaining witnesses to testify in his behalf. He has also the right, either personally or by attorney, to ascertain what their testimony will be."

In the relatively few jurisdictions and the relatively few times that this problem has arisen, the Courts have been most circumspect and quick to realize the threat to the individual liberties latent in the denial of access, to say nothing of the Pandora's box of Evil in allowing the concealment of a witness.

The Court of Appeals of Alabama in *Golson* v. *State*, 34 Ala. App. 396 (1949), at page 402 stated:

> " . . . This court, in a Per Curiam opinion in the case of Gallman v. State, 29 Ala. App. 264, 195 So. 768, 770, has clearly set forth the right and indeed the duty, of defense counsel, in preparing his client's case for trial. We quote the portions of that opinion pertinent to this cause:
>
> 'It is a mistake of a serious nature for a trial court, or opposing counsel, to assume or intimate that counsel for the defendant is not at full liberty to question, whenever he sees fit, any person who knows or is presumed to know the facts attendant upon the commission of the offense with which his client is accused. It is his solemn, sworn duty to ascertain, as far as he can, what the evidence is, and his duty is not at an end when he has examined, no matter how exhaustively, his client; he must see and talk with the witnesses. Sharwood's Legal Ethics, p. 121; Elliott's General Practice, Chapt. 1, Sections 1-5, Chitty's Practice, Vol. 2, pages 21 and 53.'
>
> 'The rule is well stated in a North Carolina case, State v. Williams, 91 N. C. 599, in the following language "It is competent for the prisoner or his counsel to converse with any one supposed to have knowledge of the offense imputed and ascertain the facts so known. *A party, even when the state is*

such cannot by first summoning a witness deprive the other party, or the accused, of the testimony of the witnesses when favorable, nor of an opportunity of ascertaining what information he may possess, before putting him on the stand, as he might do should the state decline to introduce and examine him. His information ought to be sought and obtained voluntarily and fairly from the witness, and not by what he may deem to be a constraint''.''' (Italics supplied.)

To the same effect, we thing, is the case of *Wireman* v. *Commonwealth*, 211 Ky. 495, 277 S.W 822:

"If the defendant had the right to confer with the witness, Jordan, at all, he had the right to such conference in the absence of any intimidating influences whatever. The defendant, himself, had no right to the information of the witness except that which he, voluntarily and fairly, was willing to give. If counsel for the defendant abuses his right in obtaining the true and voluntary statement of a witness with reference to the facts deemed relevant upon the trial of the case then such counsel is amenable to the statutes of this State prohibiting the bribery, or intimidation, of witnesses and other specified improper conduct in connection therewith."

The Court of Appeals of Georgia in *Wilson* v. *The State*, 93 Ga. App. 229 (1956), wherein the defendant, charged with murder, made an application to the Court to interview a person who was being held incommunicado by the prosecution as a material witness stated at page 229:

"It appears that these two motions—one made before the eye witness had been subpoenaed by the state and the other made thereafter—were made to the court after the sheriff of the county and the

solicitor general of the circuit had refused to permit counsel for the defendant to interview this witness and were made by counsel for the defendant in an effort to prepare properly for his client's defense." (Italics supplied.)

"The Constitution guarantees to every person accused of a crime a fair and impartial trial and benefit of counsel. Code (Ann.) Section 2-105. The State has no more right to deny defendant's counsel access to a witness material to the defense then it would have to secrete the witness to prevent the defendant's using him, or to deny the defendant the right to process to compel the attendance of a witness and the defendant cannot be required to call a person to the stand as his own witness without knowing in advance what the testimony will be.

See *State* v. *Gangner*, 73 Montana 187 (235 P. 703); *People* v. *Paskowitz*, 270 N. Y. Supp. 799 (151 Misc. 171); *Exleton* v. *State*, 30 Okl. Cr. 224 (235 P. 627). Counsel for the defendant not only had the right but it was his plain duty towards his client, to fully investigate the case and to interview any persons who might be able to assist him in ascertaining the truth concerning the events in controversy."

The Supreme Court of Montana in *State* v. *Gangner*, 73 Mont. 187 (1925), page 194 stated that:

"Whatever the popular notion may be it is neither the duty nor the right of the state, acting through its public officers, to secure the conviction of one of its citizens by any available means fair or foul. * * * the State had no more right to deny defendant's counsel access to a witness material to the defense than it would have had to secrete the witness to prevent the defendant using him or to deny the defendant the

> right to process to compel the attendance of a witness . . ."

In New York a somewhat similar situation occurred in *People* v. *Paskowitz*, 151 Misc. 171 (1934). There material witnesses were confined in jail and the warden supported by the District Attorney refused to allow them to be interviewed by defense counsel.

The Court in granting a motion by defense counsel to visit and talk to these witnesses stated at pages 171-2:

> "No authority has been directed to the court's attention why these witnesses should be held incommunicado. If those witnesses were released on bail or had not been committed in the first instance, there can be no question but that the defendant's counsel would have the opportunity of approaching them and interrogating them concerning their knowledge of the facts of this case.
>
> I fail to perceive any reason why the same opportunity should not exist when they are being detained as material witnesses, . . . and counsel . . . are desirous of ascertaining the truth and are making the application in good faith."

The Court just brushed aside the statement by the district attorney that the material witnesses had expressed a disinclination to be interviewed by the defendant's counsel, by stating:

> "If that be so, and the Court has no reason to doubt it, these witnesses should be permitted to speak for themselves."

The Oklahoma Criminal Court of Appeals in *Exleton* v. *State*, 30 Okla. Cr. 224 (1925), stated at page 234:

> "Where a material witness and particularly as in this case, an accomplice, is incarcerated in jail and to that extent under the control of the prosecution, and the defendant makes application for leave to interview or question such witness in reference to his testimony, under all the facts shown here, the court should afford a reasonable opportunity for such purpose, and the denial of the request of the defendant was error."

Besides the *Leahy* case, *supra*, it was also held in Texas in *Brown* v. *The State*, 3 Tex. Ct. of App. 294 (1877) at page 313:

> "It is the duty of attorneys to prepare and acquaint themselves with their cases by talking to the witnesses before the announcement for trial * * * it is the duty of the court to furnish them full opportunity and facility to converse with the witnesses and make the necessary preparation before they are forced into trial, and this is especially the duty of the court in cases involving the grave issues of the life or liberty of the citizen."

In *Bobo* v. *Commonwealth*, 187 Va. 774 (1948), the Supreme Court of Appeals of Virginia carefully analyzed a situation similar to the one petitioner presses before this court. In that case one Dickerson, confined in jail on a felony charge, was witness to a jail break by one Bobo. Said Bobo killed a deputy sheriff in making his escape. Upon capture and being called to trial for murder, counsel for Bobo applied to the trial court for permission to interview Dickerson, who was still confined in jail awaiting disposition of his case. The court allowed such interview but said that the interview be held in the presence of the prose-

cuting attorney. The court in describing what thereafter occurred stated at pages 776-7:

> "When the attorney for the accused sought to examine Dickerson in the presence of the Commonwealth's attorney he refused to talk, saying that he had made a written statement and would not say anything further until sworn as a witness. The attorney for the Commonwealth did not interfere or participate in the conversation between Dickerson and counsel for the accused."

In reversing the conviction of Bobo and remanding the matter for a new trial, the Court expressed its thinking at pages 778-9 wherein it stated:

> "There seems to be no valid reason for granting the attorney for the Commonwealth a higher right than is granted the attorney for the accused to interview a witness who has been summoned by both sides simply because that witness is in jail pending trial of a case which has nothing to do with the crime for which the accused is to be tried. The attorney for the accused has no right to be present when the attorney for the Commonwealth interviews such a witness, and likewise, it would seem that the attorney for the Commonwealth has no such right when the witness is interviewed by counsel for the accused.
>
> In Virginia we have no case on this subject. Elsewhere the weight of authority seems to be that the accused should be accorded the right to interview material witnesses who might be in jail, in the absence of the prosecuting attorney. The cases are collected in an annotation in 124 A. L. R., at page 454.

> The trial court, in its very carefully prepared opinion concluded, 'Moreover, Dickerson could not possibly have possessed any information or knowledge of any fact which was not already in the possession of the accused. The accused was the only living person who was continuously in the presence of the deceased from the time Mr. Lewis entered the jail until the homicide occurred. Such being the case, the accused was in no manner prejudiced by the order requiring his counsel to examine Dickerson in the presence of the Commonwealth's attorney, if he desired to examine him at all before the trial, and it is so held.'
>
> It is with considerable reluctance we find ourselves unable to agree with that conclusion. Under section 8, article 1, of the Virginia Constitution, an accused has the unqualified right to 'Call for evidence in his favor.' This includes the right to prepare for trial which, in turn, includes the right to interview material witnesses and to ascertain the truth. This fundamental right cannot be accorded the accused if he is hampered in his interview of his material witnesses by a prohibitory order of the court which refuses to grant him a private interview. The constitutional provision is not satisfied by a public interview. Dickerson being a witness for the accused, counsel for the accused was entitled to freely and privately talk with him.
>
> When the court is dealing with mandatory requirements of the law the principle strictissmi juris obtains."

The prime purpose of this application was to prepare for trial. For as was pointed out by the Supreme Court in *Powell* v. *Ala.*, 287 U. S. 45 (1932), with proper preparation

and investigation for trial no one can predict what the future holds, what facts might have been discovered, what course the case might have taken.

Preparation is the touchstone of advocacy. If an attorney has breached his oath and duty by unprepared or incompetent representations, then it certainly must follow that a defendant is not afforded the constitutional right to counsel when the trial court precludes the defendant and his counsel from preparation. For as set forth in *supra*, at page 57:

> "In any event, the circumstances lend emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignments until the beginning of their trial, when consultation, thorough going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that peirod as at the trial itself. People ex rel. Burgess v. Risley, 66 How. Pr. 67, Batchelor v. State, 189 Ind. 69, 76, 125 D. R. 773."

and at page 59:

> "As the Court said in Com. v. O'Keefe, 298 Pa. 169, 173, 148 Atl. 73: 'It is vain to give the accused a day in court with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case.'"

As has been set forth in *Krull* v. *United States*, 240 U. S. 122 (5th Cir. 1957) at page 126:

> "The aid of counsel in consultation, investigation and preparation for trial in a criminal case is as necessary as the presence and participation of counsel at the trial itself."

This application, it must be stressed, is not based upon any claim of right on the part of the petitioner or her counsel that an individual who by any happenstance is in the custody of any Governmental body, must submit to an interview. Such position has never been adopted by the petitioner but the petitioner reiterates that as was stated in *People* v. *Paskowitz, supra*, the mere fact of incarceration of a witness should not in any manner affect the rights of any party in respect to that witness.

It should not be assumed, and there is no basis for such assumption, that the only purpose to be served by an interview, if an interview were had, would be ease in cross-examination of a witness or that any information to be gleaned from an interview could also be gleaned on cross-examination. Firstly, such a view pre-supposes that there is such a thing as a witness for one side or for the other. A witness is not a party nor the property of a party. Secondly, that there are no limits to cross-examination. Thirdly, an attorney need never prepare his case. It is most respectfully submitted that it cannot be seriously argued that when a defendant is called before the bar, or is called to trial, and faces deprivation of liberty, that he may casually prepare his defense as he goes along, relying upon fortunate strokes in cross-examination, whether or not cross-examination is indicated, and feel that he is prepared in that manner to meet any indictment.

Certainly, it is fundamental that an investigation in a criminal case may deal with facts having no materiality with the charge upon which the defendant is arraigned, yet may give clues, leads, indications or hints to approaches or paths of defense which would be of great assistance or merit to the defendant. The abuses in a prosecution deliberately concealing or secreting a witness certainly need not be pointed out to this court. Of course, the petitioner recognizes that under our adversary system of jurisprudence the prosecution is under no duty whatsoever to disclose, in any blanket manner, the identity and/or whereabouts of those whom it intends to call as its witnesses. The point at issue, however, is that a specific identified individual whom a defendant wished to interview was not only held in the custody of the government and counsel denied access to him but also that the government deliberately, wilfully and knowingly secreted said individual from the defendant, all in flagrant violation of the defendant's rights.

The Government met the aforesaid arguments by formulating the proposition that a state prisoner, held in Federal custody, cannot be compelled to attend a meeting with a defense counsel. That contention, pithy as it was, was not the issue presented. A prisoner, save for confinement, does not lose his fundamental human rights nor does he gain any privileges as a result thereof. Specifically he, as much the same as anyone else, cannot be insulated from an attorney approaching him and requesting permission to speak to him about a pending prosecution. He, and only he, directly and without an intermediary, has the right to grant or withhold said permission. That is a far cry from the Government's creation of a prisoner being compelled

to attend a meeting with a defense counsel or a deprivation of the right to be silent if one choses so to be.

The argument that the defense could have subpoenaed Cantellops as a defense witness after he had appeared as a witness for the Government overlooks the specific issue which was a request to inquire of an individual, prior to trial, whether he would consent to an interview.

Preparation, if it is to be potent, is preparation prior to trial. That a defense counsel, in spite of the trial court's abridgement of the constitutional safeguards of the defendant, may be able to conduct a lawyer-like defense, does not vitiate the abridgement.

Coupled with the denial of access to the witness was his secretion by the Government. Neither party has the right to hide a witness, inasmuch as neither party has a proprietary interest in a witness. To hide a witness is to destroy the essential purpose of the trial, the search for truth and the pursuit of justice.

It is respectfully submitted that certiorari should be granted so that the record may be examined by this Court as to the aforesaid deprivation of constitutional rights as well as the exercise of the Court's supervisory power to formulate and apply proper standards for the enforcement of Federal criminal law.

II. The web of conspiratorial prosecution was improperly broadened so as to include the petitioner.

The proof offered at the trial, as to the petitioner, was in essence as follows: Joseph Basile, a Government witness, testified that he knew that the petitioner was the girl friend of Joseph DiPalermo. The said DiPalermo had told Basile

that he could be reached any time by phone at the petitioner's number.

That in the early part of February, 1956, he telephoned and spoke to Joseph DiPalermo and arranged to meet him that evening at a bar. They met and Basile ordered narcotics. The petitioner was present at the bar; she was also present in an automobile on the following day when a package was passed in the said car by John DiPietro, a co-conspirator, to Basile (29a-32a).

That a month or two later Basile telephoned DiPalermo, ordered narcotics from him, and thereafter met him. That he saw Joseph DiPalermo and the petitioner get out of an automobile and the former ordered the latter to give Basile a package (33a-34a).

Basile further testified that he had telephoned the petitioner during the summer of 1956 saying that he wanted to see Joseph DiPalermo and that he had some money to give him. She told him to call back. When he did, she stated that Joseph DiPalermo was furious and Basile thereupon arranged a meeting that evening with Joseph DiPalermo at which the petitioner was present (34a-35a).

Basile also testified that in the summer of 1956, Joseph DiPalermo had him wire the sum of $1,000.00 to the petitioner in care of Western Union, Grand Central Station (35a-36a).

Francis A. Renner, a customs inspector at Idlewild Airport, testified that on November 20, 1956, upon the arrival of the petitioner, Joseph DiPalermo and Salvatore Benante, from Havana, Cuba, he inspected her baggage. That the aforesaid baggage, as well as the declaration filed by her, was in good order (39a-54a).

Edith M. Loughrey, an inspectress with the United States Customs Service, testified that she made a personal search of the petitioner. This revealed that the petitioner had Nine Thousand ($9,000.00) Dollars in bills in her brassiere. This money consisted of ninety $100.00 bills, apparently new and in consecutive numbers. The petitioner initially stated that it constituted her life savings, then that it represented her gambling winnings at Havana (54a-59a).

Julius Zamosky, a customs agent, testified that he asked the petitioner as to the purpose of her trip and she stated that it was a vacation, and that she had borrowed the money from her mother to make the trip. She admitted knowing her travelling companions from the neighborhood. She initially stated that the money in her brassiere was her life savings, then that it was gambling winnings, and then that it was a loan (59a-61a).

In March, or the beginning of April, 1957, the witness, Nelson Cantellops, testified that he gave money to the defendant Ralph Polizzano, at the Squeeze-Inn Bar. The said Ralph Polizzano then passed the money to the petitioner, whom he had previously seen in said bar, most of the time in the company of Joseph DiPalermo. The aforesaid Joseph DiPalermo was at that instant at the far end of the bar (23a-25a).

The petitioner did not testify nor did she call any witnesses on her behalf.

The Court of Appeals found that there was evidence to implicate the petitioner in the distribution and delivery of narcotics. However her role as the "girl friend" of Joseph Di Palermo provides neither the warp nor woof for such a determination.

The evidence did not reveal nor establish that the petitioner was in any way a member of the alleged conspiracy. It was never established that she knew of the existence of the conspiracy or that she even intended to become a member thereof. No proof was ever offered that she knowingly participated in any conspiracy or that she had a stake in the success thereof. Whatever her faults or derelictions, and whether she would in actuality have been prosecuted had she been married to Joseph Di Palermo they certainly were not of such a nature as to make her a member of a conspiracy to violate the Statutes heretofore cited.

The evidence as to the meeting in a bar in February, 1956, indicates that she was present in a bar and nothing more. No evidence was ever adduced that she took part in any conversation or proceeding therein. Her presence in an automobile when Basile testified that a package was passed, solely indicates presence in an automobile. Again no evidence was adduced which would in any way indicate that she took part in any conversation or proceeding therein.

The evidence as to the meeting at 78th Street and Broadway, New York City, is but another instance of the relationship between Joseph Di Palermo and the petitioner. They were together in an automobile. They left the same and Joseph Di Palermo directed the petitioner to give Joseph Basile a package. There was no evidence, direct, circumstantial, or of any nature whatever that could possibly give rise to the belief that the petitioner took part in or even knew of any conversation leading up to that meeting or to the purpose thereof. To the contrary, the telephone call allegedly arranging the same was made to a place other

than her home. There was likewise no evidence adduced that the petitioner took part in any conversation at that meeting or even knew the contents of the package. The evidence is barren of any conclusion, save that she passed the package without knowing the contents thereof.

The testimony of Joseph Basile that he wired One Thousand ($1,000.00) Dollars to the petitioner was in no way substantiated by any proof as to her receipt of the same. But even if there were such proof as to receipt, there is none whatsoever as to her knowing the purpose thereof or retaining the same.

There was no proof adduced which would in any way justify the jury in inferring that the petitioner and her companions went to Cuba in furtherance of or as part of the alleged conspiracy. The possession of a sum of money, standing alone, and it was never in any way connected with the alleged conspiracy, is of no evidentiary value, any more than is a trip to Cuba. She went there and she came back with a sum of money. That, and that alone is the extent of the proof adduced by the Government.

The testimony of Nelson Cantellops that he saw Ralph Polizzano pass money to the petitioner is insufficient to raise a presumption of any type. It may have been repayment of indebtedness or any one of a myriad of acts in no way connected with the alleged conspiracy. Particularly is this so inasmuch as there was no proof whatever as to what was done with the money.

That each of the aforementioned acts, as well as the total thereof, was as reasonably consistent with innocence as with guilt.

It is respectfully submitted that the petitioner's inclusion in this prosecution was violative of the admonitions of this Court contained in *Kottéakos* v. *United States*, 328 U. S. 750 (1946) and *Krulewitch* v. *United States*, 336 U. S. 440 (1949) as to the broadening of the net of conspiratorial prosecutions and merits the granting of certiorari to determine whether the conspiratorial prosecution of the petitioner is to be confined by the constitutional requirements of due process.

III. The petitioner was denied due process by the admission of inflammatory and prejudicial testimony of the customs agents.

It might well be said that in a trial of more than three months duration the least boring testimony was that relating to this petitioner and the $9,000 wrapped in a Kleenex in her brassiere. As has been said in *Terry* v. *United States*, 7 F. 2d 28 (9th Cir. 1925) at page 30:

> "• • • a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of a lifetime".

Yet that is precisely the prejudicial error that was committed at the trial when the Court allowed the testimony of the Customs Agents as to the return of the petitioner at Idlewild Airport. Their testimony was that she, person and baggage, was subjected to a thorough customs inspection. That the baggage and the declaration filed by her were in good and proper order but that she had $9,000.00 wrapped in a Kleenex in her brassiere.

The introduction of the testimony as to the possession of the said funds, which was legal tender, and the man-

ner of possession was immaterial and highly prejudicial. The inquiries as to her travelling companions, the obtaining of travel funds as well as the funds found on her person, all of which she was in no way obligated to explain, were in no way relevant to the accusation contained in the indictment. They were of no probative value. This was simply an endeavor to degrade her and to secure her conviction on general principles. All of the foregoing was independent of the testimony offered as to her guilt or innocence, weak or strong as it might be.

It is inconsistent with the concept of a fair trial, that a Jury should be prejudiced against the defendant by any evidence save that which relates to the issue. Above all, it should not be permitted to blacken her character, particularly wherein her character was not at issue. In short, by the receipt of the inadmissible, irrelevant and highly prejudicial testimony of the Customs Agents, the prosecution was permitted to depict the petitioner as an evil woman, capable of doing most anything.

All this in spite of the pivotal holding in *United States* v. *Tomaiolo*, 249 F. 2d 683 (2nd Cir. 1957) that degrading testimony solely for the sake of degradation is highly improper and prejudicial to due process and a fair trial.

It is thus respectfully submitted that the introduction of inflammatory and highly prejudicial testimony as to the aforesaid funds merit the granting of certiorari so as to determine whether there was a denial of due process.

CONCLUSION

For the reasons hereinabove set forth this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT J. KRIEGER
THEODORE KRIEGER
Attorneys for Petitioner,
Jean Capece

Dated: March 11, 1960.

APPENDIX A

Opinion in United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 355—October Term, 1958

(Argued September 15, 1959 Decided January 12, 1960.)

Docket No. 25682

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALFREDO AVILES, CHARLES BARCELLONA, JEAN CAPECE, CHARLES DI PALERMO, JOSEPH DI PALERMO, NATALE EVOLA, VITO GENOVESE, VINCENT GIGANTE, DANIEL LESSA, NICHOLAS LESSA, ROCCO MAZZIE, CARMINE POLIZZANO, RALPH POLIZZANO, BENJAMIN RODRIQUEZ, and SALVATORE SANTORA,

Appellants.

Before:

LUMBARD, *Chief Judge,*
CLARK and MOORE, *Circuit Judges.*

Alfredo Aviles and fourteen other defendants appeal from jury convictions in the Southern District of New York, Alexander Bicks, *J.*, presiding, for conspiracy to violate the Narcotic laws, 21 U. S. C. §§173 and 174, and sentences ranging from five to twenty years imprisonment, alleging

insufficiency of proof of a single conspiracy and various errors in the admission of evidence and the conduct of the trial. Affirmed as to all defendants, except Benjamin Rodriquez whose conviction is reversed.

JEROME J. LONDIN, Assistant United States Attorney, Southern District of New York, New York, N. Y. (S. Hazard Gillespie, Jr., United States Attorney, Herbert B. Greene, Mark F. Hughes, Jr., Robert Price and Robert E. Scher, Assistant United States Attorneys, on the brief) *for appellee.*

SAUL ROTH, New York, N. Y., *for appellant Alfredo Aviles.*

ROY L. REARDON, New York, N. Y., *for appellant Charles Barcellona.*

ALBERT J. KRIEGER, New York, N. Y. (Theodore Krieger, on the brief) *for appellants Jean Capece, Joseph Di Palermo and Benjamin Rodriquez.*

ROBERT R. KAUFMAN, New York, N. Y. (Rudolph Stand, on the brief) *for appellant Charles Di Palermo.*

MAURICE EDELBAUM, New York, N. Y., *for appellants Natale Evola and Vincent Gigante.*

SOLOMON A. KLEIN, New York, N. Y. (Wilfred L. Davis, on the brief) *for appellant Vito Genovese.*

Appendix A—Opinion in United States Court of Appeals

ABRAHAM H. BRODSKY, New York, N. Y., *for appellants Daniel Lessa and Nicholas Lessa.*

HENRY K. CHAPMAN, New York, N. Y., *for appellant Rocco Mazzie.*

DAVID SCHWARTZ, New York, N. Y., *for appellant Carmine A. Polizzano.*

ALLEN S. STIM, New York, N. Y., *for appellant Ralph Polizzano.*

HERBERT S. SEGAL, New York, N. Y. (Osmond K. Fraenkel, on the brief) *for appellant Salvatore Santora.*

LUMBARD, *Chief Judge:*

Alfredo Aviles and fourteen co-defendants appeal their convictions for conspiracy to violate the narcotic laws, 21 U. S. C. Sections 173, 174 and sentences of imprisonment ranging from 5 to 20 years[1] after a three months' jury trial in the Southern District of New York. The indictment named a total of 37 defendants and 14 other co-conspirators, but only 17 defendants stood trial on the charge of conspiracy to import and smuggle narcotic drugs into the United States, to receive, conceal, possess, buy and sell

[1] Charles Barcellona and Jean Capece received five year sentences; Vincent Gigante and Ralph Polizzano received seven years; Carmine Polizzano—eight years; Alfredo Aviles, Natale Evola and Benjamin Rodriquez—ten years; Charles Di Palermo, Nicholas Lessa and Rocco Mazzie—twelve years; Daniel Lessa—fourteen years; Joseph Di Palermo and Vito Genovese—fifteen years; and Salvatore Santora—twenty years. In addition, fines of $20,000 each were levied on Joseph Di Palermo, Natale Evola and Vito Genovese.

the drugs; to dilute, mix and adulterate the drugs prior to their distribution; and to distribute the drugs. Judge Bicks granted the motion of defendant Vento for judgment of acquittal at the end of the case, and the jury acquitted defendant Fiano.

A summary of the evidence shows that there was ample support for the jury's finding of one overall conspiracy to import, distribute, purchase and sell narcotics in violation of law.

The testimony of the principal government witness, Nelson Silva Cantellops, shows that he first joined the conspiracy in March, 1955 and continued serving it in various capacities until July 1, 1957 when he was arrested. His testimony and extensive cross-examination consumed nineteen days of the trial. The government also called defendants Peter Contes, Joseph Basile, and Salvatore Marino who testified that they participated in the sale and distribution of drugs with various appellants, defendants and co-conspirators. The following chronological summary of the evidence of the conspiracy is based on the testimony of Cantellops unless otherwise stated.

In March, 1955 Cantellops attended a meeting at Al's Luncheonette at 34 East 4th Street, New York, with Charles Barcellona, Ralph Polizzano, Carmine Polizzano, Joseph Di Palermo and Anthony Colonna. Cantellops agreed to transport narcotics to Las Vegas for $1000. At the airport bus, while Barcellona was talking to Cantellops, an unidentified man handed Cantellops a package which he took to Las Vegas. In Las Vegas Carmine Polizzano met him and

introduced him to the defendant Fiano to whom he gave the package later that evening. For this delivery of narcotics Cantellops was paid $1000 by Barcellona.

In June, 1955 Cantellops made a trip to Florida to pick up a shipment of narcotics. Carmine Polizzano gave him a bus ticket and money and he went to Miami where he met Carmine Polizzano and drove to Tampa. When the rendezvous in Tampa was unsuccessful, Cantellops and Carmine Polizzano drove to Key West where outside the La Concha Hotel an unidentified man took a suitcase out of his pushcart and placed it in the back seat of the automobile in which Cantellops was waiting. After driving to Miami Cantellops took the train and delivered the narcotics to Ralph Polizzano at the "plant" at 36 East 4th Street, next to Al's Luncheonette, as Carmine Polizzano watched from across the street. For this trip Joseph Di Palermo and Carmine Polizzano paid Cantellops $600 and later he also received an ounce of heroin as a tip.

Cantellops' third trip in August, 1955 took him to Chicago. Carmine Polizzano instructed him about the trip and gave him a package of narcotics from the trunk of a car parked in front of Al's Luncheonette. Cantellops took a bus to Chicago and the day after his arrival met Carmine Polizzano at a bar on Division Street where he was introduced to a man who picked up the narcotics in the booth where Cantellops had placed them. Cantellops and Carmine Polizzano then drove back to New York and, at Joseph Di Palermo's direction, Carmine Polizzano paid Cantellops. Following the Chicago trip, in August and September, 1955, Cantellops distributed narcotics for Ralph Polizzano.

In October, 1955 Carmine Polizzano asked Cantellops to pick up narcotics in Miami. He told Cantellops that if narcotics were not available in Miami he might have to go to Havana to see certain people. Cantellops went to Miami and at the La Concha Hotel met Charles Di Palermo who introduced him to a man named "Cuba." The three men then drove to the La Concha Hotel in Key West and the next day, upon directions from "Cuba," they picked up a suitcase of narcotics in "Cuba's" hotel room and brought the narcotics to New York by train. Back in New York Cantellops delivered the narcotics to Ralph Polizzano at the basement entrance of Al's Luncheonette upon directions from Carmine Polizzano. For this trip Cantellops was paid $250 by Joseph Di Palermo and $350 by Carmine Polizzano, who also arranged for his assistant, John Russo, to give Cantellops an ounce of heroin as a tip.

In October, 1955, upon Carmine Polizzano's directions, Cantellops explored the policy banks in the Eldridge Street area on Manhattan's lower East Side to find out whether these banks might be used as a front for narcotics distributing plants. After Cantellops had explored the policy banks, Carmine Polizzano invited him to a meeting at Ralph Polizzano's apartment on East 4th Street. This meeting was attended by Ralph and Carmine Polizzano, Joseph Di Palermo, John Russo, John Ormento and Benjamin Levine. The group discussed taking over and operating policy banks as a cover for the distribution of narcotics. Cantellops reported that it would cost between $100,000 and $150,000 to purchase the banks in the Eldridge Street area. The group reached no final decision as it was stated that

the matters would have to be discussed with "The Right Man," who, as Cantellops' testimony later developed, turned out to be appellant Vito Genovese. The meeting also discussed the possibility of importing narcotics through Puerto Rico because of turmoil in Cuba and recent misfortunes respecting two shipments by boat. Cantellops suggested the use of the Island of Vieques, off Puerto Rico, as a distributing point.

During the early part of 1956, at the request of Joseph Di Palermo and Carmine Polizzano, Rosario Colletti delivered narcotics to Cantellops who in turn delivered them to John Gonzalez, alias Guayamita, at Gonzalez's apartment at 793 Ninth Avenue, where they were diluted for resale. In June 1956 Cantellops took over Gonzalez' operations and Joseph Di Palermo and the two Polizzanos arranged for Ralph Polizzano to supply Cantellops with the narcotics necessary to expand this business in the Spanish speaking market. Cantellops called Ralph Polizzano when he needed drugs and he picked them up from Russo at Al's Luncheonette or nearby places. While picking up narcotics at the East 4th Street plant Cantellops saw Ralph Polizzano and Charles Di Palermo diluting narcotics. On two occasions during 1956 when Cantellops was in the East 4th Street neighborhood, he saw Vito Genovese talking to Carmine Polizzano and on one of these occasions when Cantellops approached, he was told by Carmine Polizzano "never to interfere when he was talking to 'The Right Man.'" In the summer of 1956 Cantellops, at Ralph Polizzano's request, made other local deliveries of narcotics.

In July, 1956, Cantellops made his fifth out-of-town trip, this time to Cleveland at the behest of Ormento and Carmine Polizzano. Carmine Polizzano introduced Cantellops to appellant Vincent Gigante who drove Cantellops to Lorain, Ohio. At Lorain, Cantellops took the narcotics from behind the spare tire in the automobile trunk and then took them by bus to Cleveland. In Cleveland he met Charles Di Palermo and he delivered the narcotics to an unidentified woman in a taxicab. After Cantellops returned to New York Carmine Polizzano arranged for him to meet Ormento and in Mazzie's presence Ormento paid Cantellops for the trip.

In August, 1956, a sale by Colletti to a narcotic agent resulted in the arrest of Colletti and Russo and the latter was replaced by the defendant Salvatore Marino who thereafter handled narcotics deliveries for the Polizzanos, at the Squeeze-Inn Bar, the plant at 36 East 4th Street and Al's Luncheonette at 34 East 4th Street. Thereafter Marino made frequent deliveries of drugs to Cantellops.

In August, 1956, Cantellops made his third trip to Miami to pick up narcotics. Before the Miami trip there were discussions and meetings at which Ormento offered Cantellops $1,500 to pick up narcotics in Mexico. After Cantellops refused to do this, meetings were held with a man called "Mexican," Mazzie and Carmine Galante regarding the details of a trip to pick up drugs. Cantellops still refused to go to Mexico.

The following evening Cantellops went with Ormento, Mazzie, "Mexican" and the appellant Natale Evola to a

restaurant on East 86th Street. Here Ormento spoke to Genovese and reported back to Cantellops that "The Right Man" wanted to take a look at Cantellops to see if he was all right.

After this Cantellops went to "Mexican's" hotel room somewhere on West 85th Street and discussed the trip to Mexico with the appellant Salvatore Santora, Evola, Mazzie, Ormento and "Mexican." Cantellops persisted in his refusal to go to Mexico but suggested that he go to Miami instead. As the change in plan involved a delay, Ormento gave Cantellops money to entertain "Mexican" in New York City, which Cantellops did for the next three days. After this Cantellops drove with "Mexican" to Miami. The day after their arrival "Mexican" drove Cantellops to Pompano Beach, secured a suitcase in a motel, and gave it to Cantellops. Cantellops then returned to New York by train and later gave the bag to an unidentified man. For this trip Ormento and Mazzie later paid him $950. After this Cantellops made two deliveries of narcotics to Philadelphia. On the first occasion Cantellops delivered three or four pounds of narcotics to a lame man, with Mazzie watching the delivery from a distance. For this Ormento paid Cantellops $350 in the presence of Santora and Mazzie and told Cantellops that Santora would have another trip for him.

A few days later Carmine Polizzano arranged for Cantellops to meet with Ormento, Santora and Mazzie at which time Ormento asked him to deliver narcotics to Philadelphia for Santora. Cantellops was driven to Philadelphia and delivered the narcotics according to instructions. For the

second Philadelphia trip Santora gave money to Ormento who gave it to Cantellops in the presence of Mazzie and Evola. In addition, Cantellops testified to making a Brooklyn delivery for the same group, for which he was paid by Ormento.

In August, 1956, defendant Contes ordered a large quantity of heroin from Nicholas Lessa and Cantellops delivered this to Contes at the request of Mazzie who paid Cantellops for the delivery. The testimony of Peter Contes tended to confirm these transactions.

A few days later Ormento and Mazzie twice sent narcotics to Daniel and Nicholas Lessa, using Cantellops as the messenger. Mazzie supervised the second delivery and Ormento paid Cantellops for both deliveries.

At the end of August, or early September 1956, Cantellops attended a meeting at Mazzie's home at 2332 Seymour Avenue in the Bronx where plans were made for extending the distribution of narcotics. Earlier in the evening Cantellops drove to a German restaurant on East 86th Street with Evola, Ormento, Galante and Andimo Pappadio. After Ormento made a telephone call, they all drove to the West Side Highway and met another car. Cantellops and Ormento entered the other car which was driven by appellant Gigante. Ormento introduced Cantellops to Genovese, who was sitting in the back seat, saying to Genovese "This man is doing a good job for us. He is helping us and doing a good job for us." Ormento told Cantellops "This is the Right Man." Genovese said to Cantellops that they "were going to a meeting where territorial control was to be

discussed," that the people at the meeting were counting on Cantellops to help them and that Cantellops could earn some money by doing so. The two automobiles drove to Mazzie's home and everyone entered except Genovese and Gigante who stayed outside. Evola, Mazzie, Ormento, Pappadio, Galante and Cantellops discussed the distribution of narcotics in the Spanish market in the East Bronx by use of policy banks and sealing off the area to eliminate competing narcotics peddlers and policy banks so that they could control the narcotics traffic in this area. Evola and Pappadio thought that the plan would take a month or a month and a half to complete and the others agreed. After twenty or thirty minutes Genovese came in. He wanted to know "what was the decision in the plan, what they had in mind." When he was told about the discussion which had taken place, Genovese said that he needed this information because he wanted to know when to send his men into the area. Later, in the presence of Evola, Ormento, Pappadio and Galante, Cantellops was advised that he would be the contact man for the distribution of narcotics in this area. Cantellops later delivered narcotics in this area at Ormento's request.

In September, 1956, Ormento and Galante sent Cantellops to Puerto Rico for narcotics. In Puerto Rico he contacted someone named Laurensano who instructed him where to find one Perez on the island of Vieques. When Cantellops met Perez he was given a double marine canvas bag containing narcotics. Cantellops advised Laurensano that he was sending the drugs to three fictitious persons in care of General Delivery, Post Office, New York, and Lau-

rensano advised that he would inform Ormento. Cantellops then mailed the heroin in three packages from three separate post offices. When Cantellops returned to New York Carmine Polizzano arranged to have him meet Ormento who said the drugs had arrived and Ormento paid him for the trip.

After this Cantellops met with Joseph Di Palermo, "Cuba" and a man named Montanez, and Montanez advised that there would be no more shipments from Cuba to Miami and Key West for the rest of the year because of unsettled conditions in Cuba. This meeting took place just a few days before Cantellops was arrested in September, 1956, and he remained in prison until February, 1957.

According to the testimony of three customs inspectors, Joseph Di Palermo, Jean Capece and Salvatore Benanti visited Cuba for two days in November, 1956, and returned to New York on November 20. Jean Capece was searched by a customs inspectress who found $9,000 in new one hundred dollar bills hidden in an undergarment. Jean Capece gave three different stories regarding this money.

When Cantellops left prison in February, 1957, he resumed his narcotics dealings with the Polizzanos, the Di Palermos and Ormento. The appellant Alfredo Aviles became a customer and Cantellops and Marino delivered narcotics to him, Cantellops making his deliveries about once or twice a week from the East 4th Street plant. Aviles paid Cantellops who turned the money over to Ralph Polizzano or Marino and received $100 for each delivery. On one occasion, when Joseph Di Palermo was present, Can-

tellops saw Ralph Polizzano hand to Jean Capece the proceeds of one of these sales to Aviles. Later Aviles bought directly from Ralph Polizzano and Cantellops received commissions on the sales. Aviles in turn resold the drugs which he had purchased from Cantellops and Ralp Polizzano. Marino testified for the government and generally confirmed Cantellops' story about the deliveries and the dealings with Aviles.

Cantellops' fourth and last trip to Miami took place in April, 1957. Joseph Di Palermo and Carmine Polizzano instructed Cantellops to meet Charles Di Palermo in Miami. Carmine Polizzano provided Cantellops with a bus ticket and money and in Miami he met Charles Di Palermo and "Cuba" at the La Concha Hotel. The trio then drove to the La Concha Hotel in Key West. In Key West an unidentified man put luggage in the rear seat of their car and Cantellops and Cuba took this back to Miami in the bus. Here they met Charles Di Palermo and, after rearranging the luggage, Cantellops took the drugs back to New York on the train and delivered them to Carmine Polizzano at the plant on East 4th Street. Later Joseph Di Palermo and Carmine Polizzano paid him about $600 for the trip and he later was given a tip of an ounce of heroin by Marino on Carmine Polizzano's instructions.

At a meeting in May, 1957, in Ralph Polizzano's apartment, there was further talk about sealing up the Eldridge Street territory. Present were Ralph Polizzano, Joseph Di Palermo, Ormento, Cantellops and some friend of Bennie Levine. Cantellops was ordered to start buying up the Spanish policy banks and he attempted to arrange meet-

ings between the owners of these banks and the Polizzanos. Meanwhile Cantellops continued to deliver narcotics for the Polizzanos from the East 4th Street plant until July 1, 1957 when he was arrested.

As we have pointed out, the government called numerous witnesses to corroborate directly and circumstantially the testimony of Cantellops. The three principal supporting accomplice witnesses were Marino, Contes and Joseph Basile, the latter being the same Joseph Basile who was a government witness in *United States* v. *Stromberg*, 268 F. 2d 256, 262 (2 Cir. 1959). Marino testified to a delivery of drugs for Ralph Polizzano on July 5, 1957, and a few hours later the police seized the plant at 36 East 4th Street and found quantities of cocaine and heroin and materials used to dilute, package and distribute these drugs. Marino confirmed Cantellops testimony about the plant at 36 East 4th Street and Al's Luncheonette as centers from which narcotics were distributed by various means. He testified that he delivered narcotics for Ralph Polizzano from the fall of 1956 until his arrest on July 5, 1957.

Peter Contes testified to narcotics transactions involving Daniel Lessa, Nicholas Lessa, Rocco Mazzie and John Ormento. Contes purchased heroin from Daniel Lessa some time later in 1955 or early in 1956 and paid him $900 in the presence of Mazzie and Ormento, after which Nicholas Lessa delivered the narcotics to him. After this Contes made further purchases from Nicholas Lessa in varying amounts up to $2,600. One of Contes' customers was his cousin, Charles Pappalardo, and several days after selling him heroin in April, 1956, both Pappalardo and Contes were

arrested by federal agents who searched Contes' apartment at 318 West 49th Street and found heroin and paraphernalia for diluting and packaging narcotics.

Joseph Basile testified to narcotics dealings which began in August 1955 with the appellant Joseph Di Palermo whom he knew as "Joe Beck." Joseph Di Palermo offered to sell heroin for $8,000 a kilo and cocaine for $400 an ounce. Basile was arrested in November 1955 but jumped bail and went to Europe. When he came back in January of 1956, he ordered half a kilo of heroin and cocaine from Joseph Di Palermo for which he paid $2,000 upon delivery to him by Johnny DePietro, also known as "Johnny The Bug" and the balance of $1,500 at a later date. Basile disposed of the narcotics to his customers. Basile ordered more heroin a few days later at which time Joseph Di Palermo told him that the "goods" came from "Big John" Ormento whom Basile knew. Basile paid Joseph Di Palermo $3,500 in advance for the narcotics which were delivered to him later by Benanti. On another occasion Basile met Joseph Di Palermo and Jean Capece by telephoning Jean Capece at a number which Joseph Di Palermo had given him. Basile ordered half a kilo of narcotics for which he paid $3,500. The narcotics were delivered to Basile in an automobile by "Johnny The Bug" in the presence of Jean Capece and Joseph Di Palermo. Basile took the narcotics to Schenectady and sold it to his customers. He stayed in Schenectady until his arrest on November 10, 1956, but meanwhile he purchased narcotics about once a month from Joseph Di Palermo by telephoning Jean Capece and giving her a message for Joseph Di Palermo or arranging to talk with

him. On one occasion when Basile purchased heroin from Joseph Di Palermo, the package was delivered to him by Charles Di Palermo whom he knew as "Charlie Brody." Basile took the half kilo of heroin to Schenectady and sold it to his customers. On some occasions Joseph Di Palermo delivered narcotics to Basile in New Jersey at the Garden State Diner near the exit of the Garden State Parkway on Route 17.

None of the appellants took the stand before the jury and they called no co-defendant or alleged co-conspirator to rebut directly the strong case of the government.[2]

As is shown by the above summary of the principal testimony in the trial record of over 6700 pages, there was abundant evidence that all of the appellants, except Rodriquez, were part of one conspiracy to import, sell and deliver narcotics. The principal conspirators according to the proof were Vito Genovese, John Ormento, Joseph Di Palermo, Natale Evola, Rocco Mazzie, Carmine Polizzano and Salvatore Santora, among others. Their sources of supply were from such people as James Laurensano, "Montanez," "Cuba" and "Mexican," in Cuba, Mexico and Puerto Rico. According to Cantellops' testimony, he himself went to Puerto Rico and mailed narcotics from there. Of course many of the principal actors not only took part in the importation and transportation of the narcotics,

[2] Only five of the appellants called any witnesses, namely Carmine Polizzano, Mazzie, Gigante, Evola and Rodriquez. These witnesses testified principally regarding Carmine Polizzano's employment, Mazzie's home at Seymour Avenue in the Bronx, Cantellops and his visits to his family, and the Philadelphia neighborhood where Cantellops testified to making a delivery of drugs.

but they had to do with the distribution and delivery of them through others of the appellants such as Jean Capece, Charles Di Palermo, Ralph Polizzano, Vincent Gigante and assistants such as Nelson Cantellops, Salvatore Benanti, John Russo and Salvatore Marino who delivered to Joseph Basile, Peter Contes and William Rovira. The appellant Ralph Polizzano was concerned actively with many of the deliveries and pickups and he seems to have been more or less in charge of the plant and the activities centering around 36 East 4th Street and Al's Luncheonette. Others of the appellants such as Rocco Mazzie and the Lessa brothers, Daniel and Nicholas, had to do with distributing the narcotics to various minor outlets, such as the witness Peter Contes. Others in the group of minor distributors were the appellants Charles Barcellona and Alfredo Aviles.

While the proof is most abundant against those who were active in handling and distributing the narcotics to and from the East 4th Street plant, such as the Polizzano brothers and the Di Palermo brothers, the proof is also sufficient against those who were concerned with the planning and the strategy of the conspiracy and the expansion of its business such as Vito Genovese and Natale Evola.

Although there is no proof that Vito Genovese ever himself handled narcotics or received any money, it is clear from what he said and from his presence at meetings of the conspirators and places where they met and congregated that he had a real interest and concern in the success of the conspiracy. We find upon all the evidence that there is ample proof of Genovese's participation in the

conspiracy as one of its principal directing heads. That Genovese was called "The Right Man" by those actively dealing with the distribution of the narcotics and that he acknowledged the name is not without significance in view of his interest and participation in furtherance of the conspiracy.

From all that we have thus far said it follows that there was abundant evidence to implicate appellants Vito Genovese, Joseph Di Palermo, Charles Di Palermo, Carmine Polizzano, Ralph Polizzano, Rocco Mazzie, Natale Evola and Jean Capece. The appellants Daniel and Nicholas Lessa, Charles Barcellona and Alfredo Aviles all purchased narcotics for resale from one or more of the central conspirators on numerous occasions. This was enough to make them participants in the conspiracy as it is clear that they knew the nature of the operation. Whether they knew its full extent and all of its activities and actors is immaterial. This leaves for further consideration the sufficiency of the evidence regarding the appellants Santora, Gigante and Rodriquez.

Ralph Santora was sufficiently implicated in the conspiracy by his attendance at several meetings as well as by his use of Cantellops to deliver narcotics to Philadelphia on two occasions, as mentioned above. It was not error for the court to deny the motion of Santora's counsel to strike out Cantellops' testimony about a meeting early in August 1956 in the "Mexican's" hotel room which was attended by Santora, Ormento, Evola, Mazzie, "Mexican" and Cantellops where they discussed a trip to Mexico by Cantellops to bring in narcotics. The trial judge ex-

cluded overt act 15 of the indictment[3] from the jury's consideration, apparently because the proof was at variance as to the location of "Mexican's" hotel. Of course this did not require exclusion of the overt act and we do not understand on what theory the overt act was excluded, but in any event, the exclusion of overt act 15 did not render irrelevant and inadmissible the evidence relating to this meeting since the evidence was relevant to the conspiracy charge.

The court did submit to the jury 17 of the 28 overt acts alleged in the indictment. As there was ample evidence to warrant the jury in finding that one or more of these 17 overt acts was committed in pursuance of the conspiracy nothing turns on any failure of proof regarding overt act 15.

As to Vincent Gigante, we have already referred to his trip to Lorain, Ohio with Cantellops and narcotics for delivery in Cleveland. During the trip Gigante named a number of the alleged conspirators and asked whether Cantellops was acquainted with them. Cantellops complained to Gigante about the risks he was taking in dealing in narcotics. Upon arrival in Lorain, Gigante told Cantellops to get the "stuff" from behind the spare tire and take a bus into Cleveland. The only other evidence relating to Gigante placed him as the driver of the car in which

[3] "15. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about the month of July 1956, in the Southern District of New York, the defendants JOHN ORMENTO, ROCCO MAZZIE, NATALE EVOLA, SALVATORE SANTORA and co-conspirator Robert Roe had a conversation in a hotel on 85th Street, New York City, New York."

Genovese, Ormento, and Cantellops traveled to the meeting mentioned above at which territorial control was discussed. Gigante apparently took no part in the conversation during this drive and he did not enter the house where the meeting was held. Gigante's participation in this second incident appears to be only as a chauffeur. But his trip to Lorain with Cantellops and his knowledge that narcotics were secreted in the trunk are clear evidence of his participation in the conspiracy. His statements during the trip to Lorain would seem to constitute sufficient evidence of his knowledge of the scope of the conspiracy and of the fact that his activity was in furtherance of a larger venture.

As to the defendant Benjamin Rodriquez, we are of the opinion that there is insufficient evidence of his knowing participation in the conspiracy to have warranted submitting the case against him to the jury. Rodriquez strenuously urges that as to him the record contains evidence only of a single isolated purchase of narcotics from Cantellops, and that that evidence, without any additional showing that he knew of the conspiracy of which Cantellops was a member or intended to join in it, is inadequate to convict him. We agree with this contention.

On direct examination, Cantellops testified that in the middle of September, 1955 he delivered narcotics to Rodriquez near the Progresso Bar in the Bronx. Rodriquez pointed out the person to whom Cantellops was to make the delivery and when they walked past each other he delivered the narcotics. When Cantellops gave testimony again about Rodriquez four days later, he testified about

a delivery of drugs to Rodriquez's runner which he places as occurring in the spring of 1956. The only other evidence against Rodriquez was the testimony of a Treasury Agent that, when Rodriquez was arrested in his home on June 4, 1958, he found three cans of milk sugar and upon analysis one of these cans contained some quinine.

Upon cross examination Cantellops affirmed testimony given by him before the grand jury to the effect that he first delivered narcotics to Rodriquez in the spring of 1956. Cantellops' statement on this point was definite and thus it seems to repudiate his prior direct testimony regarding a September, 1955 delivery. Moreover, his testimony contained no clear statement that there was more than a single delivery to Rodriquez, and no suggestion of any conversation with Rodriquez or other manifestation to him by Cantellops which might have given Rodriquez knowledge as to how Cantellops obtained the narcotics.

A single act may be the foundation for drawing the actor within the ambit of a conspiracy. See, e.g., *United States* v. *Carminati*, 247 F. 2d 640 (2 Cir.), cert. denied 355 U. S. 883 (1957). But, since conviction of conspiracy requires an intent to participate in the unlawful enterprise, the single act must be such that one may reasonably infer from it such an intent. Thus, when two men join together to commit a single robbery, one may infer from their common participation in the robbery that they have conspired to commit the robbery. However, in a multiparty conspiracy of the sort revealed in the present case, with actors performing many different tasks in many

places, the inference does not necessarily follow from one contact with one member of the conspiracy.

Rodriquez was not a regular customer of Cantellops, so far as appears from the evidence. We may assume that Rodriquez knew that the narcotics were illegally imported, but there is insufficient basis in the evidence for assuming that he knew that Cantellops was an agent for an existing conspiracy. So far as appears, Rodriquez had no knowledge whatever as to how Cantellops came into possession of the drugs.

The single purchase alone was not enough to prove that Rodriquez was a participant in the conspiracy. It was necessary to the government's case to submit evidence that Rodriquez knew of the conspiracy and associated himself with it. *United States* v. *Reina*, 242 F. 2d 302 (2d Cir.), cert. denied, 354 U. S. 913 (1957); *United States* v. *Koch*, 113 F. 2d 982 (2d Cir. 1940); *United States* v. *Peoni*, 100 F. 2d 401 (2d Cir. 1938). From evidence of knowledge of the conspiracy and a transaction with one of its members it would be reasonable to infer intent to participate in it, but there was no such evidence of knowledge here. Nor was there evidence of a continuous course of dealing between Rodriquez and Cantellops, which might warrant the inference that Rodriquez had some knowledge of the character of the source from which his narcotics came.

We therefore reverse the conviction of Rodriquez and direct the dismissal of the indictment against him.

We now proceed to the consideration of the appellants' numerous claims of error regarding the admission of evi

dence and the conduct of the trial and rulings of the trial judge.

Cantellops' Prior Perjury and Its Effect on His Trial Testimony

Most of the appellants lay great stress on the character of the witness Cantellops and his admitted perjury before the Grand Jury. They argue that his testimony should have been stricken, that no defendant may be convicted on Cantellops' uncorroborated testimony, and that the indictment should have been dismissed. We do not agree. It was for the jury to judge the witness Cantellops on the basis of all that was brought out about his character, his previous activities, his statements to the government, his testimony before the Grand Jury and before the petit jury.

The jury was fully advised of how Cantellops told his story to government agents and the United States Attorney, of his several appearances before the Grand Jury and the changes and modifications in his testimony there. Cantellops testified for five days on direct examination and for fourteen days on cross-examination. The report of his testimony covers about 2,000 pages of the stenographic minutes. The government made available to defense counsel Cantellops' Grand Jury testimony of 312 pages, two question and answer statements, dated October 10, 1957 and January 16, 1958, records showing Cantellops' visits to the United States Court House, the Veterans Administration's medical records regarding Cantellops, and

Rikers Island medical records when the witness was there incarcerated in 1950 and 1953.

The fact that a witness testified untruthfully at a prior time does not require a finding that he is testifying perjuriously at trial. *United States* v. *Margolis*, 138 F. 2d 1002, 1004 (3 Cir. 1943). It is for the jury to say whether his testimony at trial is truthful, in whole or in part, in the light of the witness' demeanor, his explanations and all the evidence in the case. *United States* v. *Reina*, 242 F. 2d 302, 307 (2 Cir.), *cert. denied* 354 U. S. 913 (1957); *United States* v. *Lennon*, 246 F. 2d 24, 28 (2 Cir.), *cert. denied* 355 U. S. 836 (1957).

Nor is there any merit in the contention that Cantellops' admissions that some of his testimony before the grand jury was untruthful vitiated the indictment. The Supreme Court has held that an indictment is not subject to challenge by reason of the incompetence of evidence presented to the Grand Jury. "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." See *Costello* v. *United States*, 350 U. S. 359, 363 (1956).

The further claim is made that the convictions should be reversed because it now appears that Cantellops testified falsely at the trial that no promises had been made to him in return for his testimony. In this connection, affidavits have been filed on this appeal pointing out that on July 1, 1959, three months after the conviction in this case, the Governor of New York commuted Cantellops'

sentence for possession of narcotics. This commutation was granted at the request of the United States Attorney because of Cantellops' assistance to the government in narcotics prosecutions. It does not follow from the action of the United States Attorney and the action of the Governor that any promise was made to the witness. It is a well understood practice for the prosecutor and the chief executive concerned to give appropriate consideration to witnesses who have assisted the government. The witnesses concerned are aware that this is so; the jurors and the general public are also aware of this practice. The purpose of the government is to encourage witnesses to tell what they know; that may be accomplished without prior promise in a particular case. Consequently we do not conclude from the fact of the Governor's commutation that Cantellops was testifying falsely when he disclaimed any promise. Surely it could have been no surprise to anyone that the witness was later shown some consideration; the jury knew that Cantellops hoped for such a result and that the jury gave this due weight can hardly be doubted in the light of the cross-examination on this subject and the arguments made by defense counsel in their summations.

The Interruption of Cantellops' Cross-Examination

The appellants complain that the trial judge erroneously interfered with their cross-examination of Cantellops because the judge permitted the witness to speak to his young daughter at the end of one day and to speak to court-assigned counsel during recess on the following day. These

rulings were well within the proper discretion of the trial judge. There was no showing that these talks had to do with the substance of the witness' testimony and the argument that they unduly interfered with the right to cross-examine, or were in any way prejudicial, has no substance whatever.

On February 10, in the midst of a four weeks cross-examination which began January 30, Cantellops was shown a letter he had written his daughter in which he said he "intended" to be released from prison around Christmas 1958. Later that day the court was informed that Cantellops, fearing for his daughter's safety, wished to see her. Cantellops thereafter talked to his daughter on the telephone although he did not see her. Certainly, under these circumstances and in light of the exceptional length of cross-examination, it was well within the trial court's discretion to release Cantellops from sequestration to speak with his daughter. See *Kaufman* v. *United States*, 163 F. 2d 404, 408 (6 Cir. 1947).

The next day, following assertion by Cantellops that he was worried about his constitutional rights, the judge assigned Arnold Fraiman, Esq. as counsel and Cantellops conferred with him during recess the following day and advised him to answer certain questions which had been asked him. This course of procedure was entirely proper. No delay was involved, and the witness in fact answered all the questions asked him. The complaint of undue interference with cross-examination is frivolous. Indeed the court was exceedingly generous in the latitude it gave counsel in cross-examining Cantellops, even to the point of

permitting considerable repetition and minute inquiry into many matters of doubtful relevance.

The Testimony of Ralph Polizzano's Admissions.

Ralph Polizzano complains that the court should have granted him a mistrial because of the introduction of the testimony of James H. Gibbon, of the New York City Police Narcotics Squad, regarding admissions made by Polizzano to Gibbon. After hearing evidence, not in the jury's presence, the court rejected the claim that the admissions had been coerced.

Gibbon testified that after he arrested Ralph Polizzano on July 6, 1957, he went with Polizzano to his apartment #2 on the ground floor of 36 East 4th Street and that the latter told him the "junk" was on top of the cabinet in a black zipper case, and that the cutting apparatus and scales were in another room.

Salvatore Marino then testified to making a delivery of narcotics from the apartment at 36 East 4th Street for Ralph Polizzano before his arrest the night of July 5. On cross-examination Marino claimed that in the police station he was punched in the stomach by the arresting officer and two other officers for five or ten minutes and was knocked out. He claimed he saw two or three other officers strike Ralph Polizzano in the stomach.

Not until this point in the trial did counsel for Ralph Polizzano move to exclude Gibbon's testimony of the oral admissions on the ground they were made under duress.

Counsel asked for a hearing and for a mistrial if the court should find for Ralph Polizzano on these questions.

The trial judge could have denied the motions on the ground that they were untimely made. As it was, he granted a hearing at which Polizzano testified. From the discrepancies in the testimony of Marino and Polizzano, Polizzano's failure to complain earlier, his plea of guilty to a state narcotics charge based on the same facts, and the police medical records, there was ample reason for the judge to deny the motions as he did. Nevertheless he charged the jury that they were to disregard the admissions if they found them to have been made for fear of bodily harm, and that, in any event, they were to be considered solely against Ralph Polizzano. We find no error in these rulings.

Aviles' Postarrest Statement Regarding Ralph Polizzano

Ralph Polizzano also complains of the admission in evidence, over his objection, of an unsigned statement of appellant Aviles made after the latter's arrest on June 3, 1958. In this statement Aviles referred to a meeting with "Ralph" at the Squeeze-Inn-Bar, related that Ralph wanted him to buy stuff directly from him instead of the Spanish fellow who had introduced him and stated that the stuff he bought from Ralph was delivered by a man he called "Junior." When the judge overruled the objection to admission of the exhibit, Ralph Polizzano's counsel sought to have the name "Ralph" deleted or to have "a man" substituted, but this application was also denied. The judge

did instruct the jury three times immediately preceding and following admission of the statement that it was to be considered only against Aviles and repeated this admonition twice in instructing the jury. We find no error in the admission of the statement in evidence in view of the judge's careful and repeated instructions.

The government may introduce admissions of one defendant even though other defendants on trial are implicated, provided the jury is carefully and clearly instructed that the admission can be considered only against the declarant. *Delli Paoli* v. *United States*, 352 U. S. 232 (1957); *United States* v. *Bando*, 244 F. 2d 833, 838-9 (2 Cir.), *cert. denied* 355 U. S. 844 (1957). While it might have been the better practice under these circumstances to have deleted the name "Ralph" from the statement before admitting it in evidence, so as not to run the risk of unnecessarily focusing attention on Polizzano, we see no reason to presume that the jury disregarded the judge's repeated instructions as to the use to be made of the admissions.[4]

Barcellona's Right to Counsel

Appellant Barcellona complains that he was denied counsel in violation of his right under the Sixth Amendment which guarantees that "In all criminal prosecutions, the accused * * * shall enjoy the right to have the assistance of counsel for his defence," and under Rule 44, Federal Rules of Criminal Procedure. We think appellant was

[4] We do not overlook the fact that when the jury asked for the Aviles statement during its deliberations the trial judge directed the deletion of "Ralph" before sending the exhibit to the jury.

adequately represented. It is true that Barcellona was without counsel from the time he appeared in the district court on July 16, 1958 until November 25, 1958, when the court assigned Roy Reardon, Esq. to represent him. But the trial did not commence until January 5, 1959 and thus his counsel had six weeks in which to prepare. This was ample assistance of counsel in view of the fact that Barcellona does not advise us in what respect he was prejudiced by his lack of counsel prior to November 25, 1959. Furthermore, he was given the benefit of all motions made by other counsel during pre-trial. So far as appears, all was done that needed to be done and could be done on his behalf. While there is language in the cases that an accused is entitled to counsel "for any part of the pretrial proceedings" this is always coupled with the qualification that there is no error unless "he is so prejudiced [by the absence of counsel] as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice.'" *Crooker* v. *California*, 357 U. S. 433, 439 (1958).

Defendant Fiano's Courtroom Outburst

On March 11, when the government was adducing evidence as to defendant Fiano's birthday, Fiano burst into a tirade before the jury in which he asserted that all those on trial were convicts and that some were then serving time in prison. All defense counsel immediately moved for a mistrial. In the course of these motions counsel for Jean Capece asserted that this defendant had no criminal record, which led to further motions for a mistrial. The appellants

claim that the Fiano outburst was provoked by the government, but there is no warrant for this assertion. In the context of the questioning then in progress, Fiano's birthday was a relevant line of inquiry. Following the outburst, Judge Bicks promptly instructed the jury to disregard Fiano's statements, and also told the jury that they were not to assume from the remarks of Capece's counsel that any other defendants had a criminal record. Manifestly it was not error to deny the mistrial motions. If such conduct by a co-defendant on trial were held to require a retrial it might never be possible to conclude a trial involving more than one defendant; it would provide an easy device for defendants to provoke mistrials whenever they might choose to do so. Under all the circumstances the trial judge's instructions adequately dealt with the situation and his denial of the mistrial motions was proper. See, e.g. *United States* v. *Stromberg*, 268 F. 2d 256, 269 (2 Cir. 1959); *Reisträffer* v. *United States*, 258 F. 2d 379, 392-93 (8 Cir. 1958), *cert. denied* 358 U. S. 927 (1959).

Double Jeopardy Claims of Daniel and Nicholas Lessa and Joseph Di Palermo

Appellants Daniel and Nicholas Lessa claim that the trial court should have granted their motions for acquittal on the ground that they were twice placed in jeopardy because they had already been convicted for the same acts in *United States* v. *Stromberg*, 268 F. 2d 256 (2 Cir. 1959). In that case the evidence showed that the Lessas received their supply from Vellucci, through runners Ewing and Tedesco, until Vellucci was arrested in November 1955.

It was only after that that they turned to the defendant Ormento for their supply. Thus the Lessas, as dealers, simply purchased their narcotics supplies from two different and separate groups. The mere fact that several retailers purchase from separate suppliers at different times does not transform two separate conspiracies into one.

Analysis of the *Stromberg* record and comparison with the proof in this case shows that the two conspiracies were entirely different enterprises in all respects, their principals, the source of their drugs, the means and places of importation, their distribution points, and the centers from which they operated in Manhattan.

Joseph Di Palermo, also indicted in the *Stromberg* conspiracy, likewise claims double jeopardy. As he was not placed on trial in Stromberg since he was then a fugitive, he has obviously not twice been placed in jeopardy.[5]

The Simultaneous Trial of 17 Defendants

The complaint that the individual defendants could not receive sufficient individual consideration at a trial of 17 defendants is without basis in fact or law. The question of how many co-defendants should be tried at one trial is within the discretion of the trial court and there is no support for the claim that that discretion was abused here.

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[5] The *Stromberg* proof showed that Joseph Di Palermo's only link with the conspiracy was Vellucci from whom he purchased heroin; he had no contacts with any of the principal *Stromberg* conspirators and he never had any contact with the Lessas so far as the proof in that case showed.

The rights of each defendant were scrupulously guarded by the trial judge throughout the trial. In the number of extra challenges allowed in the jury selection, the latitude of cross-examination, the one week allowed for defense summations, and the patience show in listening to numerous motions of the many counsel, the trial judge was eminently fair to the point of being overgenerous. Moreover, the court's charge to the jury fairly summarized the evidence, distinguished the case of each defendant and emphasized the requirement of separate consideration of the case as to each defendant. Under these circumstances, there can be no complaint of prejudice from such a joint trial. See *United States* v. *Stromberg*, 268 F. 2d 256, 265 (2 Cir. 1959); *United States* v. *Bruno*, 105 F. 2d 921 (2 Cir.), rev'd on other grounds, 308 U. S. 287 (1939).

Appellant Genovese complains he was so prejudiced by testimony that he was seen emerging from an automobile on January 17, 1956 at Kenmare and Mulberry Streets in Manhattan as to have necessitated the granting of a mistrial as to him. This testimony was given by Sherman Willse, a member of the staff of the Senate Select Committee on Improper Activities, who in January 1956 was a New York City police officer. This testimony was stricken by the court[6] with clear instructions to the jury to disregard it, although the government stated that it was prepared to show that the automobile was at the time registered in the name of appellant Vincent Gigante.

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[6] In our opinion the court erred in excluding the evidence which corroborated Cantellop's testimony of the relationship between Genovese and Gigante as it tended to show that Genovese was driven around by Gigante and it was near enough in time to the events in question.

We cannot see how Genovese was improperly prejudiced by this testimony. We have read it over and conclude that it was utterly meaningless by itself and devoid of the sinister import which appellants seek to attach to it. In any event the striking of the testimony and the court's instruction to the jury cured any possible error in admitting it. Our jury system is founded on the assumption that the jury will adhere to the trial court's instructions to it. See *United States* v. *On Lee*, 193 F. 2d 306 (2 Cir. 1951), aff'd 343 U.S. 747 (1952). Under the circumstances here present, there is no reason to presume that the jury disregarded the court's instruction. —

Appellant Jean Capece complains of the admission of testimony of a customs official that she flew to Cuba on November 20, 1956 with Joseph Di Palermo and Salvatore Benanti and upon her return two days later she had $9,000 in cash concealed in her brassiere. Coming after much evidence showing that Jean Capece worked with Joseph Di Palermo in the distribution of narcotics, that Benanti was a runner for Di Palermo, and that two months earlier, in September 1956, Montanez had advised Di Palermo that no narcotics would be available from Cuba for some time because of the revolution, this testimony was relevant to corroborate Cantellop's story. Moreover, Benanti's use of a false name and address and Jean Capece's three different versions of how she came to possess $9,000 in one hundred dollar bills would hardly support the theory that the two day trip by air was for a vacation. On the contrary, the trip was persuasive independent evidence corroborating Cantellop's testimony, as it was reasonable to conclude that

the three had gone to Cuba to purchase narcotics, although apparently with some lack of success.

We have dealt with the major claims of error advanced by the appellants. The other contentions have so little merit that they do not warrant any discussion. In our opinion Genovese's motions to inspect a statement taken by the United States Attorney from Customs Agent Benjamin Begendorf, for two reports of Narcotic Agent John Enright, and to take depositions of Begendorf and Enright were without the slightest foundation. Neither was called as a government witness and both were available to be called by the defense, who failed to call either. These motions seem to have had no purpose but to delay the trial. The trial judge exhibited commendable patience and courtesy in the face of such maneuvers.

On this appeal two of the defendants have been represented by assigned counsel, Roy L. Reardon for Charles Barcellona and Allen Stim for Ralph Polizzano. These counsel represented the same defendants at trial; in addition Martin Carmichael, Jr. represented Louis Fiano at trial. We commend them for their services so rendered and the high quality of their counsel.

With the exception of Rodriquez the appellants have all been convicted after an eminently fair trial upon the convincing evidence of several accomplices which evidence was corroborated in important details.

We affirm the judgments of conviction of all appellants, except Benjamin Rodriquez and we reverse his conviction and direct that the indictment be dismissed as to him.

APPENDIX B

Constitutional Provisions

AMENDMENT 5, UNITED STATES CONSTITUTION.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutes Involved

United States Code, Title 21, Sections 173, 174:

"**§ 173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.** It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may here-

after be imported upon such drugs when imported. • • •

"§ 174. Same; penalty; evidence. Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

(Amendment enacted July 18, 1956, effective on July 19, 1956.)